NO. 81-2377

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VERA GIANECHINI, INDIVIDUALLY AND AS TUTRIX OF THE ESTATE OF DAVID GIANECHINI AND AS EXECUTRIX OF THE ESTATE OF ERNEST GIANECHINI

Appellants,

versus

CITY OF NEW ORLEANS, NEW ORLEANS FIRE DEPARTMENT, ARTHUR TURNER, JOSEPH FRICANO, EARLY AMERICAN INSURANCE COMPANY AND X,Y, AND Z INSURERS

Appellees.

ON APPEAL FROM THE LOUISIANA SUPREME COURT

BRIEF BY PLAINTIFF-APPELLANT IN OPPOSITION TO MOTION TO DISMISS

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MAY IT PLEASE THE COURT:

This Brief is respectfully submitted on behalf of Plaintiff-Appellant, Vera Gianechini, individually and as tutrix of the estate of David Gianechini and as executrix of the estate of Ernest Gianechini (hereinafter "Appellant") in opposition to the Motion to Dismiss recently filed on behalf of the Attorney General of the State of Louisiana.* It is intended to point out one serious misstatement of fact and one material misinterpretation of law presented

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* The City of New Orleans, and not the State of Louisiana, was a defendant below. No opposition or motion has been filed by it.

by that Motion. In all other respects the Court's attention is invited to Appellant's Jurisdictional Statement.

1. *THE JURY NEVER CONSIDERED THE CITY'S RESPONDEAT SUPERIOR LIABILITY FOR TURNER'S ACTIONS UNDER THE PERTINENT LEGAL STANDARD*

In its Statement of the Case, the Attorney General erroneously suggests that the jury decided the case against both of the individual defendants (Turner and Fricano) on "simple negligence" principles and not merely under a "gross negligence" standard. This is an incorrect factual statement. Although the jury considered the liability of Fricano, who was merely the driver of the ambulance and whose role was very limited, under a simple negligence theory, it determined the liability of Turner, who actively handled and was responsible for the care of the deceased, based only upon a gross negligence standard, as was recognized by the February 9, 1982 opinion of Louisiana's Fourth Circuit Court of Appeal, 410 So.2d 292, 295-96 (La. App. 4th Cir. 1982), p. A-12 of Appellant's Jurisdictional Statement.

Thus, the Attorney General makes an incorrect statement regarding the standard of liability considered by the jury as to the individual defendants. This misstatement is crucial because the question of Turner's liability under a simple negligence standard, which the trial judge had to consider in connection with the City's *respondeat superior* liability, was never considered by the jury. Thus, the error committed below in not affording to Appellant the right to a jury trial against the City (which would have involved a consideration of Turner's liability under a simple negligence standard) was substantial and not merely harmless.

II. *A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED*

In suggesting that Appellant's Jurisdictional Statement fails to raise a substantial federal question, the Attorney General relies primarily upon the decision of Judge Wisdom of the Fifth Circuit, as organ for a three judge court, in *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972), *affirmed, sub nom, Mayes v. Ellis*, 409 U.S. 943, 92 S. Ct. 289 (1972). Reliance on that decision is misplaced, however. Indeed, to the extent that that decision is applicable, it supports Appellant's position and establishes that the issue raised by Appellant presents a substantial federal question.

Melancon reached the Fifth Circuit in a series of consolidated cases, all raising the question of whether the Seventh Amendment to the United States Constitution applied to civil actions in Louisiana courts, through the due process clause of the Fourteenth Amendment, so as to preclude appellate review of facts in jury cases. The factual situations involved in those decisions are set forth at Appendix A to Judge Wisdom's decision, 345 F. Supp. 1025, 1048-1050. None of those situations related to the issue raised in this appeal, namely whether the State of Louisiana's proscription against jury trials against a sovereign offends the Due Process or Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

However, it is highly significant that the threshold issue addressed by the *Melancon* court was whether a three judge court was properly convened to consider the challenge there raised. The defendants had contended that a three judge court should not have been convened because "no substantial federal question exists requiring the case to be heard by a three-judge court". *Id.*, 345 F. Supp. at 1030. In *rejecting* that argument, Judge Wisdom noted the "in-

creasing willingness" of the courts, in light of recent Supreme Court cases, "to re-examine the old precedents" with respect to "an evolving standard of due process". Thus, Judge Wisdom wrote that:

> "we conclude that at this point in our constitutional history a substantial federal question exists here; we must reassess the requirements of due process with respect to jury trials and the review of jury findings in state civil proceedings."
> *Id.*

Although that Court found that the Seventh Amendment did not prevent appellate review of jury findings in civil trials, it did not meet or address the monumental issue presented here, whether the prohibition against jury trials against the state must fall, not only under due process standards, but under equal protection analysis as well. Certainly the questions presented here are far more substantial than those raised in *Melancon*. Indeed, in affirming Judge Wisdom's decision, *Mayes v. Ellis*, 409 U.S. 943, 93 S. Ct. 289, (1972), this Court made an implicit finding that a substantial federal question existed in that case. Even more-so should it reach the same conclusion here.

III. *CONCLUSION*

In view of the manifest unfairness and clear unconstitutionality of La.Rev.Stat.Ann. §13:5105 denying Mrs. Gianechini a right to jury trial, the Motion to Dismiss should be denied and probable jurisdiction should be noted, for the reasons set forth above and for the reasons expressed in Appellant's Jurisdictional Statement.

Respectfully submitted,

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PROOF OF SERVICE-CERTIFICATE BY BAR MEMBER

I, Robert E. Winn, one of the attorneys for Vera Gianechini, Individually and as Tutrix of the Estate of David Gianechini and as Executrix of the Estate of Ernest Gianechini, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of September, 1982, I served copies of the foregoing Brief By Appellant in Opposition to Motion to Dismiss on the several parties thereto, as follows:

1. On the City of New Orleans, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, through the City Attorney's office, City Hall, New Orleans, Louisiana 70112.

2. On defendants, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To Ronald J. Favre, Esq., Attorney for City of New Orleans, 901 First NBC Building, New Orleans, Louisiana 70112

To John P. Nelson, Jr., Esq., Attorney for Arthur Turner and Joseph Fricano, 1001 Howard Avenue, Suite 4304, New Orleans, Louisiana 70113

3. On the Louisiana Attorney General, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to William J. Guste, Jr., Attorney General; Thomas S. Halligan, Assistant Attorney General; and Charles L. Patin, Jr., Assistant Attorney General, Department of Justice, P.O. Box 44005, Capital Station, Baton Rouge, Louisiana 70804.

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